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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FCC 93-77

In the Matter of
Implementation of Section 26
of the Cable Television Consumer
Protection and Competition Act
of 1992

Inquiry Into Sports Programming
Migration

PP Docket No. 93-21

COMMENTS OF THE NATIONAL FOOTBALL LEAGUE

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OFFICE OF THE SECRETARY

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COMMENTS OF THE NATIONAL FOOTBALL LEAGUE

SUMMARY

The National Football League ("NFL" or "League") is a joint venture presently consisting of 28 member clubs. Those clubs jointly produce an entertainment product called NFL football. That product consists of an interrelated series of football games leading eventually to a series of post-season or "playoff" games that ultimately produce a League champion.

No NFL programming has "migrated" to cable television or been "siphoned" from broadcast television. Instead, the NFL has used cable television as a supplement to

Since at least 1962, all NFL games have been televised on broadcast television pursuant to one or more national television agreements. Those agreements have, over the years, provided growing amounts of televised football entertainment to fans throughout the country. Among the television innovations that the NFL has helped to create is "Monday Night Football," the only regularly-televised prime time sports event, and after 20 years on the air, still one of the country's most watched programs. And all of the NFL's post-season playoff games are available exclusively on broadcast television.

Throughout the past 30 years, NFL television policies have involved a heavy reliance on broadcast television. Indeed, it was not until 1987 that the NFL first used basic cable television. Even now, its basic cable agreements are limited to one game per week and have included specific steps to protect the interests of fans of the competing teams. Thus, any game televised nationally on basic cable is also shown on broadcast television in the home market of the visiting team. If the game is sold out, it is similarly available on broadcast television in the home market of the home team. No other professional or college sport imposes such a requirement.

The NFL's limited use of basic cable was motivated not by short-run issues of profit maximization, but rather by

an effort to maintain existing levels of television exposure and income and to experiment with a well-established form of television technology. The games that were first placed on cable in 1987 were games that the broadcast networks were not then interested in televising. The net effect of the NFL's cable packages has been to significantly increase the amount of televised NFL football available, while retaining a full menu of games on broadcast television.

No NFL game has ever been shown on pay-per-view, and there are presently no plans to televise games on pay-per-view. NFL Commissioner Tagliabue has specifically confirmed that the Super Bowl will remain on broadcast television for the remainder of the decade and that no playoff games leading to the Super Bowl will be moved to pay-per-view without giving timely notice to interested Committees of Congress. Moreover, any use of pay-per-view for regular season games would be on a limited and supplemental basis and would be designed to give viewers an option to view an additional game.

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networks, ESPN, and Turner Network Television ("TNT").^{1/} The League will focus its comments on the time frame proposed by the Commission (i.e., 1980-present). Nonetheless, it is important for the Commission to recognize that, throughout the past 30 years, the NFL's television policies have regularly and consistently expanded the amount of televised professional football available to consumers. In 1961, a fan in a League city had 22 regular and post-season games available on television. By 1970, the total number of NFL games available on broadcast television had grown to over 60, and by 1992, that total had grown to nearly 100. Fans in cities without an NFL team have had even more NFL games available on television.

2. Paragraph 6.

Paragraph 6 of the Notice seeks comments on the nature of the marketplace for sports programming, and specifically how that marketplace has changed over the past 15 years. (§ 6, n.14.) As the Commission properly notes, the marketplace today "is vastly different from that of 1977." The significance of those differences, however, and what they mean for the sale of sports programming bear closer review.

^{1/} Thus, the NFL will not comment on television policies in other professional sports (Notice, §§ 16-17) or college sports (Notice, §§ 18-22, 31-35). Nor do we address issues relating to superstations or local or regional cable networks, none of which is licensed to televise regular season or post-season NFL games. (Notice, §§ 7, 26.)

The marketplace now includes both more sellers and more buyers than it did 15 years ago. Advertisers no longer see sports programming as a unique means for reaching desired audiences and are therefore less willing to pay a premium for sports events. And the shrinking audiences that the networks deliver make it more difficult for broadcasters to recoup their rights fees.

In sum, the marketplace is far more competitive today, both in terms of buyers and sellers, than it was 15 years ago. Major broadcast and cable networks have publicly stated their willingness to do without sports programming, including the NFL and Major League Baseball. The Fox network has grown and prospered without sports programming, and some have gone so far as to predict that one or more of the three major networks will follow suit and essentially eliminate its sports division. To try to predict programming trends in the face of such far-reaching changes is inherently risky and could well generate both forecasting and regulatory errors.

3. Paragraph 7.

Paragraph 7 seeks information on the growth of national and regional cable networks over time. Limiting itself to the growth of national cable networks, it is the NFL's understanding that cable television has grown to the point where both of the League's cable carriers, ESPN and TNT, are available almost universally in households that subscribe

to cable television. The most recent information available to the NFL is that 96 percent of the over 93 million television households in the country have access to cable television and that 61.4 million households subscribe to ESPN and 58.3 million households subscribe to TNT.

B. Measuring Sports Programming Migration

1. Paragraph 8.

Paragraph 8 of the Notice proposes to measure migration "by comparing the total quantities of regular season games exhibited on broadcast and non-broadcast media from year to year and by making a separate post-season comparison." The NFL believes that this measurement is not appropriate, and agrees with the Commission "that a simple comparison of the number of games, without additional analysis, may not be sufficient to evaluate viewer satisfaction." (¶ 9, n.18.) At a minimum, the measuring rod should be whether programming that was otherwise available on broadcast television has moved to a non-broadcast medium, and whether, as a result of any such "migration," consumers have access to fewer games on broadcast television than they did previously.

Moreover, any simple numerical comparison is not fully responsive to Congress' stated concerns, and would yield misleading and erroneous conclusions. There must also be an evaluation of overall market conditions, including the willingness of broadcasters to purchase the rights to sports

programming. If television rights are sold to basic cable networks because they cannot be sold at a reasonable price to broadcasters, that cannot properly be considered "migration."^{2/}

By any measure, there has been no "migration" of televised NFL football. The recognition that a "simple comparison" of the number of games shown on broadcast and cable television is not adequate is particularly important with respect to the NFL, where cable television has been a supplement to an extensive broadcast television package and has had the effect of increasing the number of games available to fans and therefore expanding output.

The League's use of cable television has not diminished in any "way the quantity or quality of [football] programming available on free television." (Notice, ¶ 9, quoting H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 125.) Fans have access to as much or more NFL football on free television as was available in 1980, both with respect to regular season and post-season games. And there is no reason to believe that broadcasters have a substantial interest in

^{2/} The League does not believe that "migration" can be measured by reference to audience ratings. (See Notice, ¶ 8.) If anything, the ratings demonstrate that fans are not dependent upon the broadcast networks for NFL football, and further that fans have responded enthusiastically to NFL games on cable television. See p. 15, infra, and Exh. D.

purchasing the rights to the additional games now being televised on basic cable.

C. Evaluating Changes in Video Distribution of Sports Programming.

1. Paragraph 9.

Paragraph 9 of the Notice seeks comments on the factors underlying sports programming decisions. Those factors are more numerous and complex than simply a desire to "maximize . . . overall net revenues." Leagues that are successful will base their television strategies on a long-run approach and will implement policies that benefit both teams and fans.

In 1961, the NFL first sold an overall network package that provided both equal exposure for the clubs and equal sharing of television revenues. Certain of the stronger NFL clubs, such as Baltimore, Cleveland, and New York, could have refused to join in that package on the ground that their economic self-interests would have been better served by continuing to market their television rights independently. Instead, those clubs agreed to forgo some television exposure and income to strengthen the overall health of the League joint venture and to enhance the economic well-being of the weaker clubs.

What is critical is that there be some of the

exposure (or over-exposure) that it brings, the audience levels, the quality of the telecasts, the promotional value derived from the telecasts, and the legislative and regulatory environment. For example, a league might err in accepting a higher offer from a network that reaches fewer homes or whose affiliate network generally consists of weaker stations. In those instances, a strategy of maximizing net revenues -- at least in the short term -- could have significant negative long-term effects.

The NFL has consistently pursued this long-run approach in negotiating its television contracts. For example, from 1977 to 1981, the League generally televised five "special games" each year, with ABC agreeing to pay a particular amount for each game televised. (These "specials" were generally games televised on Thursday or Sunday nights.) Because of its concerns regarding overexposure, the NFL elected not to televise a full weekly schedule of "specials," and as a result limited its revenue potential. Similarly, in 1987, in negotiating new television contracts, the League elected to continue televising Monday Night Football on ABC, rather than to accept a potentially higher offer from Fox which, at least at the time, reached significantly fewer homes and relied on weaker affiliates. In both instances, the NFL's focus was on the long-term effects of its decision, rather than on short-run revenue maximization.

Further, there can be no question that leagues must and do consider both the interests of fans and the concerns of Congress. For example, in 1973, Congress enacted legislation that required the NFL and other leagues to televise locally home games that were sold out at least 72 hours in advance of the game. Pub. L. 93-107, 47 U.S.C. § 332. Although the statute expired after three years, the NFL continues to adhere to the policy underlying the expired law because of Congress' expressed concerns on the matter.

VIDEO DISTRIBUTION OF SPORTS PROGRAMMING

A. General Considerations

1. Paragraph 11: League Structure and Playing Schedule.

Paragraph 11 of the Notice seeks general information on League organization, the playing schedule, and game telecasts. During the time covered by this Inquiry, the National Football League has consisted of 28 member clubs, which are divided equally into two conferences -- the National Football Conference and the American Football Conference. Within each conference, there are three divisions -- Eastern, Central, and Western. (The current conference and divisional lineup is set forth in Exhibit A.) Each NFL team plays a sixteen-game regular season schedule, with those games divided equally between home and away games. The schedule that a particular team plays is determined in part by the division within which the team plays and in part by its finish in the

prior year. The schedule primarily matches teams in the same division against a set of mostly common opponents and gives more successful teams somewhat more difficult schedules in the following season.

With respect to post-season play, prior to the 1990 season, ten teams qualified for the playoffs: the six divisional champions as well as the two other teams in each Conference with the best records. (These latter teams are known as "wild-card" teams.) Beginning in 1990, a third wild-card team was added from each conference, expanding the total number of playoff qualifiers to twelve teams. Those teams then play in a four-week, single elimination tournament, culminating with the two Conference champions meeting in the Super Bowl.

2. Paragraph 11: Current Television Contracts.

Each season the 28 NFL clubs play 224 regular season games, all of which are televised. Television rights to all regular and post-season NFL games are sold by the League as part of one or more network packages, and all regular season and post-season championship games are televised on broadcast television. The NFL is the only league that televises every one of its regular season games on broadcast television. (As explained below, games televised on a cable network are simultaneously available on broadcast television in the visiting team market and, if sold out, in

the home team market.) No regular season games are separately sold for telecasting on a local or regional basis, whether on broadcast, cable, or a pay-per-view service.

The NFL now has contracts with three broadcast networks -- ABC, CBS, and NBC -- and two cable networks -- ESPN and TNT. Under these agreements, each network is sold the rights to broadcast a certain package of games during the season. For example, NBC primarily broadcasts game involving teams in the AFC, while CBS primarily broadcasts games involving teams in the NFC. (Inter-conference games are carried by the network associated with the visiting team; thus, if the Washington Redskins (NFC) play the San Diego Chargers (AFC), the game will be carried on CBS if it is played in San Diego and on NBC if it is played in Washington.) The CBS and NBC games are typically broadcast on Sunday afternoons, as well as on Thanksgiving Day and on Saturday afternoons late in the season.^{3/} ABC telecasts are shown on Monday night, and the ESPN and TNT telecasts are primarily shown on Sunday night.

The Sunday afternoon games are divided between regional telecasts, which are typically shown at 1:00 p.m.

^{3/} No games are televised on Saturday afternoon during the bulk of the regular season under the terms of 15 U.S.C. § 1293, which effectively precludes NFL games from being televised in competition with college football games between the second Friday of September and the second Saturday in December.

Eastern time, and national telecasts, which are shown at 4:00 p.m. Eastern time. All games are televised in the home market of the visiting team and, if the game is sold out 72 hours in advance, in the home market of the home team as well. For example, if the Washington Redskins and Atlanta Falcons play a game in Washington at 1:00 p.m. on Sunday, that game will be televised in Atlanta and, because Washington home games are always sold out, in Washington as well. In addition, depending on the network's assessment of the attractiveness of that contest, it may be televised in many other parts of the country as well. Aside from the requirements involving broadcast in the markets of the competing teams, decisions concerning where to televise games are made by the networks, not by the NFL. During the regular season, CBS and NBC will generally alternate the national double-header game shown at 4:00 p.m. Eastern time.^{4/}

In addition to the regular season telecasts, each of the post-season playoff games leading to and including the Super Bowl is televised by one of the three broadcast networks. ESPN televises the AFC-NFC Pro Bowl, the League's

^{4/} These telecasting patterns have remained unchanged since 1970. See Exhibit B, a list of 1992 national games and the network on which each is televised.

annual All Star game. Finally, the five networks also televise a total of 16 pre-season games.^{5/}

3. Paragraph 11: Developments in NFL Television, 1987-1993.

From 1980 through 1986, NFL games were televised exclusively on broadcast television. During the course of the regular season, most fans could choose from up to 70 or more different regular season games.

Beginning with the 1987 season, the NFL sold a package of games to cable television. The initial package, which covered the 1987-89 seasons, called for eight games to be televised on ESPN on Sunday night. These games did not replace games that were otherwise being shown on broadcast television. Fans still had available the same number of Sunday afternoon telecasts on CBS and NBC, as well as the Monday night telecasts on ABC. Instead, the ESPN contract added a fourth package of games to the fans' menu -- a national cable telecast on Sunday night. Thus, for 1987-89, fans with cable television had eight additional games available to them each year.

^{5/} Other pre-season games are televised pursuant to arrangements entered into by individual clubs. With very few exceptions, pre-season games are televised on a local broadcast station. Because telecasting of preseason games appears to be outside the scope of the Commission's Inquiry (e.g., ¶¶ 8, 11), it is not addressed further in these comments.

Beginning with the 1990 season, the NFL took further steps to increase the number of games available to fans. First, the season was restructured so that each team played its 16 regular season games over the course of 17 weeks, thus giving fans three additional games on broadcast television on Sunday afternoon as well as an additional national cable game on Sunday night and an additional Monday night telecast on ABC.^{6/} Second, the League expanded the number of teams qualifying for the playoffs from ten to twelve, thereby adding two additional playoff games, both of which are televised by a broadcast network (ABC). Finally, the League added TNT as a second cable carrier, thus increasing the number of national cable telecasts on Sunday night from eight to seventeen in 1990 and 1991 and eighteen in 1992 and 1993. The effect of these changes has been to increase the number of televised regular and post-season games available to fans to over 100 each year.

In addition, the NFL requires that all games televised by ESPN and TNT be simultaneously available on broadcast television in the home city of the visiting team and, if the game is sold out, in the home city of the home team as well. Thus, if a game in Dallas between the Dallas Cowboys and New York Giants were televised on either of the

^{6/} In the 1993 season, the League's 16-game schedule will be played over 18 weeks, thus providing still another week of televised NFL football.

cable networks, it would also be shown on a local over-the-air station in New York and, if the game were sold out, on broadcast television in Dallas as well. To our knowledge, this requirement is unique to the NFL. We know of no other arrangement that offers similar protection to local area fans.

4. Paragraph 12.

Paragraph 12 of the Notice seeks information on ratings. NFL football remains a strong and attractive television entertainment product. For example, in 1992, Monday Night Football had a composite rating of 16.8 and ranked seventh among 123 prime time television programs.

The fact remains, however, that ratings for NFL football -- like ratings for all television programming -- have declined over time. In 1981, the League earned the highest television rating in its history, which helped produce record television revenues in 1982, the start of a new five-year contract. Those ratings were:

ABC -- 21.7

CBS -- 17.5

NBC -- 13.9

By 1986, the last year of that five-year television contract, the ratings had fallen to:

ABC -- 18.6

CBS -- 15.2

NBC -- 12.3

By 1992, the ratings had fallen even further;
and were:

ABC -- 16.8

CBS -- 13.0

NBC -- 11.2

The 1992 ratings represented a drop on all three networks from the 1981 levels, with CBS off the most (26%), followed by ABC (23%) and NBC (19%). On an overall basis, NFL broadcast ratings are 23% lower than in 1981.^{2/}

With respect to cable television ratings, NFL games have been the highest rated programs ever in the history of either ESPN or TNT, and NFL games on ESPN are the top rated basic cable programs in history. Specific data on ESPN and TNT ratings may be found at Exhibit D.

5. Paragraph 13.

Paragraph 13 of the Notice requests information on the terms of the current League contracts. Each of the five network contracts was entered into prior to the 1990 season and will expire following the 1993 season. The contracts cover all NFL regular season and post-season games and are broken down as follows:

^{2/} A chart illustrating the change in broadcast ratings over time appears at Exhibit C.

a. ABC receives four pre-season games, 17 regular season games (18 in 1993), two playoff games, and one Super Bowl game.

b. NBC receives three pre-season games, all non-prime time regular season AFC games, all non-prime time inter-conference games where the visiting team is an AFC team, all AFC playoff games (other than the AFC Wild Card game televised by ABC), and one Super Bowl. CBS receives the corresponding package for the NFC.^{8/}

c. TNT and ESPN share a package of 17 (18 in 1992 and 1993) Sunday night games, with TNT carrying the games during the first half of the season and ESPN during the second half of the season. Other than the Pro Bowl, which is televised by ESPN, no post-season games are included in the cable contracts. Each cable network also receives the rights to three preseason games. The rights sold to CBS and NBC are non-exclusive (i.e., the two networks air competing telecasts on Sunday afternoon), while the ABC and cable network rights are exclusive.^{9/}

^{8/} The rights to the 1993 Super Bowl have not yet been sold and will shortly be offered to the three broadcast networks.

^{9/} Paragraph 13 of the Notice seeks information concerning "the geographic 'home territories' within which the team can sell broadcast and cable exhibition rights." For NFL regular season and post-season games, no team is entitled separately to sell any television rights. The blackout rule applies to stations whose signal penetrates within a 75 mile radius of the home city. See WTWV, Inc. v. NFL, 678 F.2d 142 (11th Cir. 1982).

Paragraph 13 also seeks information regarding rights fees. The total value of the five NFL contracts is approximately \$3.6 billion. The rights payments escalate over the four-year term of the contracts.

6. Paragraph 14.

Paragraph 14 of the Notice seeks information concerning the expiration of the contracts and whether the "number of games to be exhibited will change significantly" prior to the expiration of the contracts. As noted, each of the NFL's contracts will expire following the 1993 season. In 1993, the NFL will play its 16-game schedule over 18 weeks. As a result, there will be an increase in the number of games shown on broadcast television. In 1993, an average fan will have access to four additional games on broadcast television. The number of games televised on cable television will be unchanged from 1992.

B. Cable and Pay-Per-View

1. Paragraph 15: Use of Basic Cable.

Paragraph 15 of the Notice raises certain specific questions concerning the NFL, and focuses on the impact of the Sunday night cable package on total viewing of NFL games. The effect of the cable packages has clearly been to increase total audience size and total availability of NFL football. As the Commission recognized in a 1991 report:

"The NFL contracts with cable networks have increased the

number of games available nationally to those with cable service. Moreover, because those contracts require the cable services to make their NFL games available to broadcast stations in the home markets of the teams that are playing, hometown fans without cable service are not deprived of access to their teams' games."^{10/}

As stated in that report, Sunday night cable games are available not solely on cable, but also on broadcast television in the market for the participating teams. More important, the cable agreements take games that would otherwise have been available only on a regional basis and instead make them available throughout the country. Thus, the League's contracts with the cable networks have brought additional games to fans across the country and are therefore a supplement to what is available on broadcast television. Absent the cable contracts, the national Sunday night cable games would instead have been regional games, televised on Sunday afternoon, and unavailable to most of the country and supplanting other games in the areas where they are telecast.

A specific example illustrates this point. In 1989, the inaugural ESPN telecast featured the Washington Redskins against the Dallas Cowboys at RFK stadium at 8:00 p.m. Although this game was played on Sunday evening rather

^{10/} Office of Plans and Policies, The Future of Broadcast Television in a Multi-channel Market 79 (1991).

than on Sunday afternoon, NFL fans in both Washington and Dallas continued to have a full array of NFL telecasts available to them on broadcast television. Specifically, earlier on that Sunday, fans in Washington saw the Los Angeles Rams play the Minnesota Vikings at 1:00 p.m. on CBS, and the Cincinnati Bengals play the Los Angeles Raiders at 4:00 p.m. on NBC. In Dallas at 1:00 p.m., both the Cleveland-Tampa Bay game on NBC and the Chicago-Green Bay game on CBS were televised, and at 4:00 p.m., the fans in Dallas saw the Raiders-Bengals on NBC. In addition, the fans in both Dallas and Washington saw the Cowboys-Redskins games on both broadcast television and on ESPN at 8:00 p.m., and the remainder of the country had access to this game at 8:00 p.m. on ESPN. Prior to the cable arrangements, the Cowboys-Redskins game would have been televised in both Dallas and Washington at 1:00 p.m., and at 4:00 p.m., another game would have been televised in those cities. And of course there would have been no game available at 8:00 p.m. For a chart illustrating this example, see Exhibit E.

Moreover, the circumstances that led to the NFL's decision to televise games on cable networks demonstrate that those agreements have benefitted consumers and sports fans and have expanded the total availability of NFL football. The NFL was the last major sports league to use cable television. By 1987, when the NFL first decided to televise

games on a cable network, use of cable television by other professional (and college) sports was relatively common. The leading cable sports network, ESPN, was in some 50 million American homes. The decision to sell television rights to ESPN in 1987 was a function of both technology and economics. From a technological standpoint, it was clear by 1987 that cable television was a well-accepted medium for both sports and entertainment programming. Its growth and development had been encouraged by both Congress and the Commission, and the NFL's contract with ESPN simply followed on the highly favorable experience of other leagues and the colleges. The response of sports fans to the League's cable telecasts, as reflected in consistently high ratings, combined with the protection afforded local fans by the unique requirement of simultaneous broadcast availability, negates any suggestion that consumers have somehow been disadvantaged by the NFL's limited use of cable.

There was an economic element as well to the decision. Prior to 1987, in addition to its regular schedule of Monday night games, ABC had carried a package of "specials" which were shown on Thursday and Sunday nights. The ratings for those games had been disappointing, and ABC advised the League that it did not wish to continue broadcasting those games as part of the new contract. Nor were CBS and NBC, for a variety of reasons, willing to purchase those games at any